Supreme Court, U.S.
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No._____

In The

SUPREME COURT OF THE UNITED STATES

RONALD ALLAN COHEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Samuel S. Jacobson, Esquire
Counsel of Record
Datz, Jacobson, Lembcke & Wright, P.A.
One Independent Drive, Suite 2902
Jacksonville, Florida 32202
(904) 355-5467
Attorneys for Petitioner

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QUESTION PRESENTED

I. Can a Guidelines sentence be imposed on disputed issues by adoption of conclusory recitals in the presentencing report without particularized findings by the sentencing judge?

II. Can a Guidelines sentence be adjusted upwards for obstruction of justice on the basis of conduct which was part of the underlying crime itself?

III. Can a Guidelines sentence be adjusted upwards for use of a special skill without use of a special skill by the defendant himself?

PARTIES

All parties are reflected in the caption. No Corporate Disclosure Statement is required.

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PETITION FOR WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Eleventh Circuit is unpublished. Entry of the Eleventh Circuit opinion is reported at 49 Fed. Appx. 287 (11th Cir. September 13, 2002). The opinion is unofficially reported at 2002 W.L. 31174102 (11th Cir. September 13, 2002). A copy of the opinion appears as at App. 1 of the Appendix hereto. Denial of a Petition for Rehearing and a Petition For Rehearing En Banc is reported at 49 Fed. Appx. 287 (11th Cir. January 30, 2003). The denial is unofficially reported at 2003 W.L. 346960 (11th Cir. January 30, 2003) and appear at App. 12 of the appendix hereto.

JURISDICTION

The statutory basis for Supreme Court jurisdiction is 28 U.S.C. 1254 providing for writs of certiorari in criminal cases.

The time for petitioning for certiorari was extended to May 30, 2003 by order of the Supreme Court entered on May 2, 2003.

RULE 29.4b COMPLIANCE

A copy of this petition has been served on the Solicitor General of The United States, Room 5614, Department of

Justice, 950 Pennsylvania Avenue, N. W., Washington, DC 20530-0001.

SENTENCING GUIDELINES INVOLVED

United States Sentencing Guideline 3B1.3 provides:

Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

United States Sentencing Guideline 3C1.1 provides:

Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the

obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

STATEMENT OF THE CASE

Facts:

This case involves a Northern District of Florida sentencing. The sentencing judge was Senior Judge Maurice M. Paul. The sentencing proceeding was flawed. The sentencing guidelines were misapplied. Every upward adjustment sought was upheld. Every contested downward adjustment was denied. The sentence was excessive. Fairness was deserved.

Petitioner pleaded guilty to participation in a fraud conspiracy. He acknowledged joining the scheme at its end-phase. The presentence report submitted for his sentencing recommended upward adjustments of sentence because of (1) substantial fraud proceeds obtained by others before he became complicit in the scheme, (2) obstruction of justice by virtue of the very acts constituting his complicity, and (3) petitioner's special skill as a lawyer even though he allowed only use of his name and performed no lawyering skills.

At sentencing petitioner sharply disputed the presentence report. Judge Paul improperly imposed the burden of the disputed matters on petitioner, saying "It's the way I've done it twenty years." Petitioner offered substantial dispute at sentencing on the issues in question. The government offered nothing in contravention. Judge Paul nonetheless approved each upward adjustment suggested in the presentence report. He did so by brief,

conclusory adoption of the presentence report without any particularized findings as to the matters in dispute. His "findings" appear at App. 12 - App. 13 of the appendix hereto.

Petitioner was sentenced to 121 months incarceration when his sentence should have been in the 24-37 months range.

REASONS FOR WRIT

Introduction:

Petitioner understands that Guidelines appeals and petitions are not generally welcome. The Sentencing Guidelines, however, are a hugely important element of our federal criminal justice system. This Court's supervision and monitoring is critically needed if the Guidelines are to work properly and constitutionally. This case presents an array of sentencing improprieties and is an unusually appropriate vehicle for review and correction of the way the Guidelines are being implemented.

Need for Particularized Findings:

The presentence report charged petitioner with fraud losses predating his joinder in the alleged fraud conspiracy. This is contrary to the Guidelines themselves. See, Application Note 2 to §1B1.3 United States Sentencing Guidelines. The sentencing judge approved the presentence report by simple adoption of the conclusion stated in the presentence report without any particularized findings as to petitioner. This is a prevalent problem in Guidelines application. The failure to make actual findings is a serious

sentencing infirmity. See, *United States v. Wise*, 976 F.2d 393, 402-403 (8th Cir 1992):

> [T]he Guidelines do not reduce district court judges to mere automatons, passive compilers of ciphers, or credulous naifs who must accept as canon all that which is presented to them regarding a defendant's involvement in the crime charged or conduct relevant thereto....[T]he preponderance of the evidence standard ... does not relieve the sentencing court of the duty of exercising the critical fact-finding function that has always been inherent in the sentencing process ... [The standard signifies] a recognition of the fact that if the probation officer and the prosecutor believe that the circumstances of the offense, the defendant's role in the offense, or other pertinent aggravating circumstances, merit a lengthier sentence, they must be prepared to establish that pertinent information by evidence adequate to satisfy the judicial skepticism aroused by the lengthier sentence that the proffered information would require the district court to impose.

The Court's intervention is needed to assure that sentencing judges do not abdicate their responsibility to make and provide findings.

Obstruction Adjustment

The act relied upon here for the upward obstruction adjustment was part and parcel of the offense charged against defendant. It was one of the overt acts explicitly charged in the indictment. The Eleventh Circuit's

affirmance of the obstruction adjustment accordingly conflicts with the law in other circuits. See, *United States v. Harris*, 104 F.3rd 1465 (5th Cir. 1997) (two level increase for obstruction set aside when the same acts had been part of the defendant's accessory-after-the-fact conviction); *United States v. Lloyd*, 947 F.2d 339 (8th Cir. 1991) (obstruction adjustment "...does not apply to conduct that is part of the crime itself."); *United States v. Werlinger*, 894 F.2d 1015 (8th Cir. 1990) (obstruction increase improper where the alleged act of concealment was part of the base offense).

This Court's intervention is needed to resolve the conflict between the position of the Eleventh Circuit and the position of the Eight and Fifth Circuits.

Special Skill:

A defendant should not be subject to a special skill upward adjustment merely because he is a lawyer. Actual use of a special skill is required. Petitioner here permitted only use of his name. He never performed actual legal services for the scheme.

The Eleventh Circuit upward adjustment for use of a special skill directly conflicts with the position taken by the Fifth Circuit in *United States v. Hemmingson*, 157 F.3rd 347 (5th Cir. 1998). The Fifth Circuit held in *Hemmingson* that where a defendant lawyer never actually "performed legal services" and never performed "even pretextual legal work, " an upward adjustment for use of a special skill was inapplicable.

This Court's intervention is needed to resolve this conflict between circuits.

CONCLUSION

For the foregoing reasons the Court's writ should issue for review of the proceedings below.

Respectfully submitted,

DATZ, JACOBSON, LEMBCKE & WRIGHT, P.A.

Samuel S. Jacobson, Esquire
Counsel of Record
Florida Bar No.: 039090
One Independent Drive, Suite 2902
Jacksonville, FL 32202
(904) 355-5467
Attorneys for Petitioner